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SUBJECT: CONTROVERSIAL COUNTER-TERRORISM LEGISLATION ENTERS
INTO FORCE

REF: A. 2008 Berlin 619, B. 2008 Berlin 862, C. 2008 Berlin
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¶1. (U) SUMMARY: On August 4, significant amendments to the German Criminal Code entered into force that criminalize a range of terrorism-related preparatory actions such as participating in terrorist training or acquiring weapons/bombs with the intent to commit attacks that endanger the German state. The amendments also outlaw the distribution and acquisition of bomb making and similar instruction materials, but again, prosecutors will need to demonstrate that these instructions motivated individuals to commit violent crimes. Establishing relations with a terrorist group with the intent of receiving training to commit attacks is also outlawed. By encouraging early intervention into potential terrorist activity, the amendments aim to reduce the threat of attacks against Germany and the international community. Although opposition parties (FDP, Greens and Left Party) and many media criticized the law, Justice Ministry officials assured Embassy that the law was an effective and necessary tool to prosecute terrorists. END SUMMARY.

Amendments to Penal Code Target "Homegrown" Terrorists

¶2. (U) The Justice Ministry drafted the legislation in reaction to a series of cases in which German citizens and/or residents traveled to Pakistan to undergo terrorist training at camps belonging to the al Qaida-affiliated Islamic Jihad Union (IJU). German security authorities estimate there are up to 140 individuals who have travelled to overseas training camps of whom approximately 70 have returned to Germany. The most prominent example of "homegrown" terrorists are the members of the Sauerland IJU group that planned attacks on U.S. institutions in Germany in 2007 and are currently standing trial in Dusseldorf, two of whom are German citizens who converted to Islam and underwent terrorist training in Pakistan. In March 2008, a German resident (with Turkish citizenship) carried out a suicide attack that killed two U.S. soldiers in Afghanistan after having receiving training in Pakistan. More recently, a number of German citizens and residents have appeared in extremist videos filmed in the Af/Pak border region.

Keeping Pace with the Terrorists

13. (U) The new amendments modernize Germany's counter-terrorism legal framework. Although there were important post 9/11 legislative changes, the foundation of existing German counter-terrorism law originates from the 1970s in reaction to the militant left-wing Red Army Faction (RAF). Justice Minister Zypries (SPD) maintains that the amendments to the Criminal Code were necessary to close existing loopholes. Earlier laws outlawed membership and support of domestic and foreign terrorist organizations, but the new sections now permit the prosecution of individuals who engage in preparatory terrorist actions. The new law responds to the development of modern terrorist structures that are often comprised of small numbers of compartmentalized or independent actors operating without any firm connection to a hierarchically-based group. Justice Ministry Counter-terrorism Office Director Hellmann explained to EmbOffs that although the law intends to address threats from international terrorists, it is designed to include all terrorist activity, including activities from violence prone right- and left-wing extremists. The new legislation includes three main elements.

Section 89a: Serious Violent Acts Endangering the State

14. (U) The first of the modifications to the Criminal Code

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allows authorities to prosecute individuals who "take preparatory actions to carry out a crime intending to, and capable of, threatening the existence or security of the German state or constitutional order." These include crimes such as murder, manslaughter, and hostage-taking. The definition of what constitutes such criminal preparatory actions includes four alternatives: (1) receiving instructions or instructing another person participating in training inter alia in the manufacture or use of firearms, explosives, radioactive substances, poison or special equipment necessary to carry out attacks or in other skills serving to commit attacks; (2) manufacturing, acquiring or storing weapons, or explosives in order to commit a violent offense; (3) procuring or storing items or substances crucial to the manufacture of weapons, substances or equipment to carry out attacks; and (4) the fundraising, funding, or supplying of assets to prepare for a violent crime.

15. (U) The preparatory actions are only punishable if they were committed with the intent to prepare a violent crime endangering the state. This means that the sole acquisition of knowledge/skills without the corresponding intent to commit such a violent crime is not punishable. Hellmann explained the amendments did not require, however, that a detailed and specific attack plan existed; plans need only be roughly outlined. If the preparatory actions occur outside the European Union, they are only punishable if committed by a German national or a foreign national with Germany as primary residence, or if the terrorist act is to be committed inside Germany or against a German national. Crimes falling under this first new criminal offense are punishable by up to ten years imprisonment.

Section 89b: Initiating Terrorist Contact

16. (U) Establishing relations with a terrorist group with the intent of receiving training to commit a violent crime is punishable by up to three years imprisonment or a fine. Critics of this element claim the threshold of what is a criminal action is pushed too far towards mere preparatory actions. However, Justice Ministry drafters maintain that an

individual who establishes or sustains contacts with the intent of taking up training to commit a violent crime already at that time creates an abstract danger and this is sufficient justification for criminalizing such actions.

Section 91: Bomb-Making Manuals

¶7. (U) The third new criminal offense criminalizes a range of actions related to receiving or providing instruction for carrying out violent attacks, in particular using the internet (for uploading and downloading such instructions). For such activity to be punishable it is not necessary for prosecutors to prove that the perpetrator had a specific attack in mind; nevertheless, the instructions must be judged to have the effect of actually motivating or arousing the readiness of persons to commit violent crimes.

Amendments to Procedural and Immigration Law

¶8. (U) The law also contains procedural modifications to extend existing special investigatory methods (surveillance, searches, confiscation) to the new Section 89a and gives the Federal Attorney General authority to take over prosecution of cases of particular importance. The changes to immigration law allow for the extradition and denials of entry to foreign nationals if there are known facts of plans to commit violent crimes. The Banking Act was also amended as to include the new Section 89a.

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Critics of the Amendments

¶9. (SBU) The amendments, which finally passed the Bundestag on May 28 (and Bundesrat on July 11) after over a year of debate, were heavily criticized by opposition parties (FDP, Greens and Left party). The debate centered on concerns about the right balance between (growing) state powers and security and personal freedom. The amendments were passed in the Bundestag with CDU/SPD majority against the votes of the opposition parties and only managed to pass the Bundesrat with the supporting votes of Baden Wurttemberg which is co-governed by the FDP and CDU - all remaining states with FDP co-government opposed the law. FDP and CDU parliamentarians had both criticized the Justice Ministry's law during the legislative process, but for different reasons. FDP members, who have citizens' rights and protection of personal privacy agenda, claimed existing laws were sufficient and viewed the amendments as unacceptably widening the scope of criminal liability.

¶10. (SBU) Some CDU politicians had initially questioned the effectiveness of some of the amendments and argued that prosecutors would face difficulties demonstrating that defendants who underwent terrorist training at overseas camps were doing so with the express intention to subsequently carry out attacks (see reftels). EmbOffs raised these latter criticisms with BMJ's Hellmann who responded that German prosecutors were experienced in proving intent, as proof of intent is a requirement for all premeditated crimes. Hellmann also noted that drawing conclusions about intent from certain external circumstances or actions would not be too difficult for prosecutors, adding proof of a detailed and specific attack is not required; plans need only be roughly outlined.

COMMENT

¶11. (SBU) The new legislation is the second important counter-

terrorism package adopted this year. The first, which went into effect on January 1, was drafted by the Interior Ministry and provided the Federal Office of Criminal Investigation with new investigatory powers and lead responsibility in certain counter-terrorism investigations. Taken together, the two legislative packages have considerably strengthened Germany's ability to investigate and prosecute terrorist cases.

BRADTKE